Supreme Court, U.S.
FILED
APR 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1489

IN THE

Supreme Court of the United States

October Term, 1989

CENTRAL VERMONT RAILWAY, INC.,
Petitioner,

vs.

STATE OF VERMONT and
CITY OF BURLINGTON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE VERMONT SUPREME COURT.

REPLY TO BRIEF IN OPPOSITION

FRED I. PARKER, ESQ.
Counsel of Record for Petitioner
LANGROCK SPERRY PARKER
& WOOL
P.O. Box 721
Burlington, Vermont 05402
(802) 864-0217

Of Counsel:

LANGROCK SPERRY PARKER & WOOL
LIAM L. MURPHY, ESQ.
MITCHELL L. PEARL, ESQ.
P.O. Box 721
Burlington, Vermont 05402
(802) 864-0217

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

BEST AVAILABLE COPY

18 pp

TABLE OF CONTENTS*

	Page
Reply to Brief in Opposition	1
Appendix:	
Excerpts from Combined Response Brief/Reply Brief of the State of Vermont and City of Burlington	1a
Excerpts from Appellee's [CVR's] Reply Brief	2a
Excerpts from Trial Brief of Defendant Central Vermont Railway, Inc.	6a
Excerpts from Defendant Central Vermont Railway, Inc.'s Post Trial Brief	7a
Excerpts from Defendant Central Vermont Railway, Inc.'s Proposed Findings of Fact and Conclusions of Law	11a

* Reference is made, pursuant to Sup. Ct. R. 29.1, to the listing of parties made in the Petition. No Amendment is required.

Page

TABLE OF CASES

Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944) 4
Fox River Co. v. Railroad Comm'n, 274 U.S. 651 (1927) 4
Lewis v. City of Portland, 35 P. 256 (Or. 1893) 3
Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980) 4

IN THE

Supreme Court of the United States

October Term, 1989

No. 89-1489

CENTRAL VERMONT RAILWAY, INC.,
Petitioner,

vs.

STATE OF VERMONT and
CITY OF BURLINGTON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE VERMONT SUPREME COURT.

REPLY TO BRIEF IN OPPOSITION

Petitioner, Central Vermont Railway, Inc. ("CVR"), submits this reply to the Joint Response of the State of Vermont and the City of Burlington, for the sole purpose of responding to the State's and City's argument that the federal issue raised in CVR's petition was not raised in the courts below. Petitioner has included in the

appendix additional materials from the record to further illustrate and substantiate the fact that the federal issue was indeed raised in both courts below.

The State's and City's claim—which is their primary argument in opposition to the Petition for Certiorari—that CVR did not properly raise the "taking" issue in either the Vermont Supreme Court or in the trial court is seriously misleading. CVR did raise the issue; both explicitly and implicitly, it was the foundation of all of CVR's arguments against the positions asserted by the State and City. Respondents knew the issue was being raised, and argued against it. In fact, in the Vermont Supreme Court, they stated that "CVR's demands for payment of compensation in 'damages' would easily amount to several hundred thousand dollars *per acre.*" (1a) (Emphasis in original.)

CVR's main arguments in the courts below were aimed primarily at establishing that CVR owns these filled lands in fee simple absolute. Respondents' arguments, in contrast, were primarily aimed at convincing the courts that CVR had some lesser interest or no interest at all. Thus, Respondents are correct that this case was not primarily viewed as a taking case by any of the parties or the courts below. But CVR did argue, as Respondents concede, *see Joint Response* at 6-7 & n.1, that the arguments urged by the State and City could not be upheld without running afoul of the requirement of just compensation. Respondents' claim that the issue was not raised is thus misleading and flatly wrong.

In CVR's Post-Trial Brief to the Superior Court, for example, CVR argued that the State could not "reenter" or "revoke" the grants to CVR and its predecessors because, at the very least, such grants became "vested upon exercise." (7a). CVR went on to

cite cases from various states for the proposition that wharfing rights, once exercised, established valuable private property rights that could not be taken back without compensation. *E.g.*, *Lewis v. City of Portland*, 35 P. 256, 263 (Or. 1893) ("These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor.") (quoted at 10a).

In the Vermont Supreme Court, CVR's opening brief was primarily aimed at establishing CVR's fee simple absolute title, and at establishing the error of the superior court in determining that the lands were held subject to a public trust servitude. It was only upon the City's and State's cross-appeal, in which the State and City renewed their argument that CVR's interest was a franchise or a fee subject to a condition, that the possibility of a taking arose. Accordingly, in CVR's reply brief, CVR argued to the Court that such a result would amount to a taking. (2a-5a) References to "taking" or the necessity of "just compensation" appear at least 11 times in the Reply Brief in response to various arguments by the State and City that CVR had less than a fee simple absolute. In the conclusion of CVR's Reply Brief, CVR explicitly requested that—should the Court agree with the State's arguments that CVR's interest was subject to revocation or forfeiture—the Court require that compensation be paid. (5a)

The Vermont Supreme Court, in effect, ignored CVR's arguments and avoided the taking issue under the guise of interpreting the 1827 Act. The Court did not need to reach the taking issue because it had already determined that there were no rights to be taken. That "interpretation" may be reviewed by this Court to ensure that it had a reasonable and substantial basis in

state law. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944); *Fox River Co. v. Railroad Comm'n*, 274 U.S. 651 (1927).

The taking occurs in this case as a result of the Vermont Supreme Court's decision to "infer" an unexpressed "intent" on the part of Vermont's 1827 General Assembly to create a condition subsequent—without any basis in state law. Thus, according to the Vermont Court, if the property is not used forever for railroad, wharfing and storage purposes, the State of Vermont can re-enter and divest the railroad of its fee simple title. Such an unprecedented decision has far-reaching effects not only to the railroad's property, but to waterfront land ownership and a myriad of private property rights throught the State of Vermont.

For the reasons stated in CVR's petition, the Vermont court's determination was highly irregular, constituting an evasion of Petitioner's federally protected property rights, and Petitioner respectfully requests that its petition be granted.

Respectfully submitted,

FRED I. PARKER, ESQ.
Counsel of Record for Petitioner
LANGROCK SPERRY PARKER
& WOOL
P.O. Box 721
Burlington, Vermont 05402
(802) 864-0217

Of Counsel:

LIAM L. MURPHY, ESQ.
MITCHELL L. PEARL, ESQ.

APPENDIX

Excerpts from
Combined Response Brief/Reply Brief
of the State of Vermont and
City of Burlington

Filed in the Vermont Supreme Court,
Dated 2 June 1988

[Page 41:]

VII.

IF APPELLEE HOLDS FILLED LANDS IN FEE SIMPLE SUBJECT TO THE PUBLIC TRUST DOCTRINE, IT DOES SO SUBJECT TO THE STATE'S SOVEREIGN AUTHORITY TO DECLARE, ESTABLISH, AND IMPROVE PUBLIC ACCESS EASEMENTS.

A. *The State as the Public Trustee has Sovereign Authority to Declare That Public Access is the Only Permitted Common and Public Use on Portions of Filled Lands, and CVR Has No Compensable Property Interest When that Authority is Exercised.*

CVR's demands that public access easements be obtained by exercising the power of eminent domain is filled with irony.

* * *

CVR's demands for payment of compensation in "damages" would easily amount to several hundred thousand dollars *per acre.*

[Page 43:]

CVR has no compensable property interest when the public's trustee exercises its sovereign powers over the trust in such a manner. *See, State v. City of Cleveland, supra.* The State may set out ample portions of the filled lands, no longer used for railroads, as public access and recreation areas.

Excerpts from
Appellee's [CVR's] Reply Brief

Filed in the Vermont Supreme Court,
Dated 12 May 1988

[Pages 2-5:]

* * *

II. THE GRANT TO CVR WAS OF FEE SIMPLE ABSOLUTE, TO THE EXTENT THE GRANT WAS A FRANCHISE, SUCH FRANCHISE VESTED UPON EXERCISE AND ITS RIGHTS CANNOT BE TAKEN WITHOUT COMPENSATION.

The grants under the 1827 and 1874 Acts conveyed fee simple absolute title. [CVR Brief §III.A.] The State asserts that the grants conferred by the 1827 and 1874 Acts were in the nature of a "franchise" of an indefinite duration, such that the railroad rights to the filled lands would terminate upon nonuse for railroad purposes or after a reasonable time elapsed. [State Brief 18-23.]

* * *

Even if the Legislature grants are considered "franchises," such characterization is irrelevant to the current status of title. The State notes that Connecticut has referenced similar wharfing rights as "franchises." [State Brief 19 n.3.] However, the majority view, including Connecticut, is that such franchises vest upon exercise and when vested are subject to constitutional protection, including the right of compensation if there is a taking. [CVR Brief §III.C.]

In other contexts, Vermont joins in that majority view:

> A franchise has the character of property or estate in which the holder has a vested right, and it is entitled to the same protection under constitutional guarantees as other property.

State v. Gibbs and Lynch, 82 Vt. 526 (1909).

The referenced "constitutional guarantees" include the right of "an equivalent in money" when the property is taken for use by the public. *Vermont Constitution*, Ch. 1, Art. 2. Appellants themselves have recognized this right to compensation specifically in regard to takings of the filled lands on several occasions. [Finding 13; PC 241].

* * *

III. TITLE AND POSSESSION TO FILLED LANDS CREATED UNDER STATUTORY OR COMMON LAW AUTHORITY ARE NOT SUBJECT TO REVOCATION OR FORFEITURE.

III. A. *Revocation Or Forfeiture Cannot Be Made Without Compensation.*

The State asserts that by virtue of the public trust doctrine, any legislative grant of submerged lands is revocable citing *Illinois Central Railroad v. Illinois*, 146 U.S. 387 at 455-56, 459-60 (1892) and *National Audubon Society v. Superior Court*, 658 P.2d 709 at 723 (Cal. 1983). [State Brief 13.]

It is undisputed that the Vermont Legislature has the right to revoke a grant under the statute to the extent it was not yet exercised and, in fact, the actual grant of the right to "wharf out" under the 1827 Act was repealed and revoked effective in 1968. Acts of 1967, No. 308 (Adj. Sess.), Sec. 10. However, in this case, the grant was exercised by the railroad prior to revocation. [Finding 18; PC 232.]

Neither *Illinois Central* nor *National Audubon*, support the State's proposition that title and possession of submerged lands which have already been filled under authority of common law or legislative grants can be revoked and forfeited. The Court in *Illinois Central*

addressed a revocation of a grant of 1,000 acres covering the entire harbor of Chicago, which grant had *not yet been exercised.* The Court held that such right of revocation did not apply to grants in aid of navigation or for public purposes or which did not impair the public use and enjoyment of the remaining lands. *Illinois Central,* 146 U.S. at 452. Moreover, the Court held a revocation of a grant would require compensation for the cost of any improvements. 146 U.S. at 455.

In *National Audubon,* the Court did not hold that the grant was subject to revocation, but that title under grants which were not in aid of navigation or commerce was impressed with public trust rights. Moreover, the Court stated that any retaking of title to such lands required payment of compensation even if such retaking was in the exercise of public trust rights. *National Audubon* at 722-23. *See also State v. Superior Court of Placer County,* 625 P.2d 256, 261 (Cal. 1981). Further, the Superior Court in this case, citing *City of Berkeley* and *Illinois Central,* found that if the State were to reclaim the filled lands, any improvements could not be appropriated without compensation. [Finding 62; PC 246.]

[Page 17:]

* * *

V.C. *Easements For "Public Improvements" Over Filled Land May Not Be Taken Without Payment Of Just Compensation Unless For A Navigation Purpose.*

Some courts have recognized that filled lands are subject to certain public trust rights, including the federal navigation servitude, but those decisions do not extend such rights to include the acquisition, without just compensation of such filled lands for uses

unconnected with navigation. *See* e.g. *Clement v. Burns*, 43 N.H. 609, 614 (1862) (taking of filled lands for road not permitted without compensation); *State v. City of Cleveland*, 82 N.E.2d 709 (Ohio 1948) (construction of lakeside highway on filled lands not permitted without payment of compensation); *Lewis v. City of Portland*, 36 P. 256 (Or. 1893) (taking of filled lands for bridge abutment not permitted without payment of compensation), *United States v. 50 Foot Right of Way*, 337 F.2d 956 (3rd Cir. 1964) (taking of right of way for petroleum pipeline for "war effort" not in aid of navigation and therefore compensation must be paid).

* * *

[Pages 22-23:]

* * *

VI. CONCLUSION AND REQUESTS FOR RELIEF

* * *

CVR further requests that this Court hold that title to the filled lands is not subject to revocation or forfeiture unless there is a breach of an express or clearly implied condition of the grant and that CVR has not breached any such condition, therefore, no grounds exists for revocation or forfeiture of the grant. In the event the Court determines that grant is subject to revocation or forfeiture, CVR requests the Court to hold that compensation must be paid for all improvements made to the formerly submerged land upon such revocation or forfeiture.

* * *

Excerpts from
Trial Brief of Defendant Central
Vermont Railway, Inc.

Filed in the Chittenden Superior Court,
Dated 6 January 1987

[Page 33:]

Furthermore, even if the Court finds that the filled lands granted under a "franchise" the Plaintiffs must adequately compensate Defendant for the taking:

> "A franchise has the legal character of property or an estate in which the holder has a vested right and is entitled to the same protection under constitutional guarantees as other property." *State v. Gibbs and Lynch*, 82 Vt. 526 (1909).

Such constitutional protections include the right of "an equivalent in money" when the property is taken for use of the public. *Vermont Constitution*, Ch. 1, Art. 2. The Defendants' right to compensation for takings of the filled lands has been fully recognized by the Plaintiffs in the past. *See infra* pp. 16-18.

* * *

[Pages 38-39:]

Notwithstanding this position, Defendants vehemently disagree with Plaintiffs that the land uses and restrictions articulated in the zoning ordinance adopted by the City of Burlington in December 1986 are consistent with requirements of any public uses covenant or easement. Defendants believe that such zoning ordinance is not consistent with the dictates of the *Vermont Planning and Development Act*, 24 V.S.A. §4401 *et seq* under which shoreline zoning is permitted. Furthermore, the Defendant asserts that the ordinance adopted by the City of Burlington is merely an effort to take CVR's land without compensation in the event they are not successful in taking the land without compensation under this suit.

Excerpts from
Defendant Central Vermont Railway, Inc.'s
Post Trial Brief

Filed in the Chittenden Superior Court,
Dated 3 April 1987

[Pages 7-9:]

IF GRANTS OF 1827 AND 1874 ACTS WERE FRANCHSIES, SUCH HAVE BECOME VESTED

The Plaintiffs assert that there is a "majority rule" that "the General Assembly acting as the public's sovereign trustee may reenter, revoke or seek forfeiture of its grants and decide the next public use(s)". (*See* Plaintiffs' Post-Trial Brief at pp. 5-7). However, the holdings of the cases cited by Plaintiffs do not stand for such proposition; none address the issue of an implied right of revocation where there has been an express grant or attempted grant of the title to the submerged lands.

In fact, even if the grants are "franchises," the majority view is that such grants become vested upon exercise and when vested are subject to constitutional protection, including right of compensation if there is a taking:

> Where the reclamation and filling of the adjacent shore or submerged soil was expressly permitted by legislative enactment, or was authorized by a statute fixing a bulkhead, harbor, or dock line, or similar statute, or by a valid license or permit, or by local common law, it has usually been held or recognized that filled land created by a riparian or littoral proprietor belongs to him as a part of the upland, at least where the public rights with respect to navigation and commerce are not substantially impaired 91 A.L.R. 2d 857, 867.

For example, courts in the following states have held that the wharf rights are vested upon exercise:

> *Connecticut: State v. Knowles Lombard Co.*, 122 Conn. 263, 267 (1936): "It is obvious that if the riparian owner builds a wharf in the exercise of his franchise, to that extent the rights of the public to the use of the beach are extinguished. . . ."
>
> *New Hampshire Clement v. Burns*, 43 NH, 609, 614 (1822): ". . . That part of the shore having been reclaimed by the erection of the wharf, the new land thus formed must be regarded, so far as the proprietor is concerned, as private property and subject to the right of eminent domain, like the upland to which it is attached."
>
> (Clement continues to be cited with approval. *See Donaghey v. Croteau*, 401 A.2d 1081 (1979).)
>
> *Rhode Island: Allen v. Allen*, 32 A. 166 (RI 1895): ". . . The establishment of a harbor line permits the riparian owner to carry the upland or high-water mark out a certain distance from the natural shore. Actual extension of the upland to the new line extinguishes all public rights within it. The land which was formerly shore becomes upland, and, while the rights to shore and upland are not changed, they are carried further out into the tidal stream or sea. . . ."
>
> *New York: U.S. v. 25.4 Acres*, 52 F.Supp. 75, 83 (1943): ". . . '[W]here the grant or patent merely recites that it is for the purposes of commerce, the patentees and grantees, despite this recital, take unrestricted titles, subject, of course, to such regulations as the State in its sovereign capacity may make for the general regulation of commerce and navigation. . . .'
>
> Even though there was no conveyance in terms of the land under water, but a grant only of the right to build bulkheads and docks and to fill in, the rule is the same. . . ." *citing Matter of City of New York*, 246 N.Y.1, 157 N.E. 911, 917 (1927)."

See also: Beard's Erie Basin, Inc. v. New York, 142 F.2d 487, 491 (1949): "... These statutes ... made it lawful for certain water-front owners in the area involved to construct docks and fill in land under water in front of their property between the shore and a designated line. ...

....

... [Upon filling Plaintiff], therefore, holds not only the upland and lands under water in fee simple, but also the filled lands . ..."

See also: First Construction Co. v. State, 116 N.E. 1020, 1025-6 (N.Y. 1917): "... [T]he acts prior to the one of 1884 did not by their terms, purport to grant and convey lands under water. They simply granted a privilege of filling in or erecting improvements.... [I]t was implied that when the privilege had been exercised and the lands filled in, the beneficiary of the grant would become the owner thereof. ...

....

... [A]n act granting the right to fill in lands under water, and thereby acquire title to same, gives an inchoate vested interest in the lands described which is a property right and of which unless forfeited or lost in some way, the grantee cannot be deprived without compensation .... [T]he preponderance of authority in other jurisdictions is in favor of this view ...."

Maryland: See Harbor Island Marine, Inc., supra at 1-2.

New Jersey: River Development Corp. v. Liberty Corporation, 144 A.2d 180 (N.J. 1968): "... [T]he local common law or local custom to improve the shore and by reclamation or improvement to obtain title in fee simple, was a mere license revocable at the will of the Legislature. It became irrevocable

only when the license had been executed and the riparian owner had effected the reclamation or improvement. . . . (p. 189)

. . . .

'. . . [I]n virtue of a local custom, long prevalent in this State, and now having the force of established law, the adjacency of his land to the stream invests him with a license to fill in and wharf out, on the public domain, to such an extent as does not interfere with the public rights of fishing and navigation, and this license, when executed, becomes irrevocably, and confers on the riparian owner a good and indefeasible title to the land thus reclaimed.' " (p. 198)

Florida: Hayes v. Bowman, Fla., 91 So.2d 795, 800 (1957): ". . . It should be noted . . . that no title is acquired *until* such submerged lands are actually filled in or permanently improved." (Emphasis added)

Oregon: Lewis v. City of Portland, 35 P. 256, 263 (Ore. 1893): ". . . [T]he riparian owners who have taken advantage of the permission or privilege to build wharves . . . have acquired rights that would not be affected by the repeal of the statute. These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor. . . . Nor do we find anything in the case of *Illinois Cent. R. Co. v. Illinois*, in conflict with this result."

* * *

Excerpts from
Defendant Central Vermont Railway, Inc.'s
Proposed Findings of Fact and
Conclusions of Law

Filed in the Chittenden Superior Court,
Dated 27 March 1987

[page 26:]

* * *

ALTERNATIVE CONCLUSION—FRANCHISE IS "VESTED RIGHT"

120. "A franchise has the legal character of property or an estate in which the holder has a vested right and is entitled to the same protection under constitutional guarantees as other property." *State v. Gibbs and Lynch*, 82 Vt. 526 (1909).

121. Such constitutional protection includes the right of "an equivalent in money" when the property is taken for use of the public. *Vermont Constitution*, Ch. 1, Art. 2.

122. The Defendants' right to compensation for takings of the filled lands has been fully recognized by the Plaintiffs in the past. *See* Exhibits 214-223.

123. The grants under the 1827 and 1874 Acts were not of "indefinite duration." The legislature specifically provided that the duration of such franchise is "forever."

124. CVR has a vested right in the filled lands. Therefore, if the City or State wishes to obtain such lands, CVR must be compensated fully for such property.

* * *